IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 1840 of 2002

With

CIVIL APPLICATION NO.6387 OF 2002

For Approval and Signature:

Hon'ble MR.JUSTICE D.K.TRIVEDI
and
Hon'ble MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

AMRATLAL CHHAGANLAL RAICHURA

Versus

UCO BANK

Appearance:

1. First Appeal No. 1840 of 2002

MR JT TRIVEDI for appellant No. 1

MR DN PANDIT for Respondent No. 1

RULE SERVED BY DS for Respondent No. 2-3

MR GT DAYANI for Respondent No. 4

NOTICE SERVED for Respondent No. 4

CORAM : MR.JUSTICE D.K.TRIVEDI
and
MR.JUSTICE K.M.MEHTA

Date of decision: 16/01/2003

COMMON ORAL JUDGEMENT

(Per : MR.JUSTICE D.K.TRIVEDI)

1. In this Appeal a short question is raised by the appellant - original defendant No.4, who in term challenged the judgment and decree passed by the learned Civil Judge (S.D.), Porbandar on 31.3.98 in Special Civil Suit No.56 of 1989. Record and proceedings is also available for our perusal. Mr. J.T.Trivedi, learned advocate appearing on behalf of the appellant, had while arguing the matter taken us through the record and proceedings wherein the learned trial Judge has while proceeding with the Suit filed by the respondent plaintiff bank proceeded by considering that all the defendants were duly served though the summons were not received by appellant and the summons were accepted by original defendant No.2 on behalf of himself as well as on behalf of rest of the defendants and the learned trial Judge has passed order below the plaint on 15.12.90, which reads as under:-

"The deft.No.3 and 4 are not present when called out though duly served with summons. Hence the suit is to proceed ex parte against the deft.No.3 and 4 accordingly.

Sd/-
Civil Judge (S.D.)
Porbandar."

Accordingly it is the contention of Mr. Trivedi that the trial court has decreed the suit against all the defendants though appellant - original defendant No.4 was not duly served and such decree deserves to be set aside. Mr. Trivedi has also while filing this Appeal annexed the judgment under challenge recorded by the learned trial Judge on 31.3.98 in Special Civil Suit No.56/89 as well as the certified copy of the summons issued by the learned trial Judge and the Bailiff's report regarding service of the summons on the parties. The appellant has also produced the xerox copy of the certified copy of the notice issued on the parties when the respondent plaintiff bank has taken out execution proceedings to execute the decree against the defendants and the report of the Bailiff regarding service of the notice on the parties dated 10.1.2001. It is the contention of Mr.

Trivedi that even when the execution proceedings were initiated by the plaintiff and when the notice was issued to the parties even at that stage notice was not duly served to the appellant - original defendant No.4 and even at that stage, notice of the execution proceedings were received by the defendant No.2 Shri Narandas on behalf of defendant No.1 and rest of the defendants and report of the Bailiff also suggest that at the time of service of the notice, defendant No.2 was present, who is the Proprietor of the defendant No.1 Firm and he has accepted the notice on behalf of himself as well as rest of the defendants, including the appellant original defendant No.4. In light of the above facts Mr. Trivedi has vehemently urged that ex facie the decree passed against the appellant - original defendant No.4 deserves to be set aside. He placed reliance upon the provisions of Order 3 Rule 2 as well as Order 5 Rule 11 of the C.P.C. Order 3 Rule 2 is as under:

"2. Recognized agents.- The recognized agents of parties by whom such appearances, application and acts may be made or done are-

(a) persons holding powers-of-attorney, authorizing them to make and do such appearances, applications and acts on behalf of such parties;

(b) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is expressly authorized to make and do such appearances, applications and acts."

Order 5 Rule 11 is as under:-

"11. Service on several defendants.- Save as otherwise prescribed, where there are more defendants than one, service of the summons shall be made on each defendant."

It is also brought to our notice by Mr. Trivedi that after the decree was passed against all the defendants, instalment was prayed for by defendants Nos.1 and 2 and the said defendants were represented through advocate Shri B.M. Kotecha and the trial court has also granted instalment of Rs.15,000/-- to be paid every month, as the decree was passed against the defendants and in favour of the plaintiff for a sum of Rs.1,10,829.85 Ps. with interest. The original defendants Nos.1 and 2 inspite of

granting instalment had not paid the amount and ultimately the bank has instituted proceedings for execution of the decree by filing Execution Application before the trial court and in the execution proceedings, the court has issued notice to the defendants and even in the execution proceedings, the Bailiff has affected notice on all the defendants through defendant No.2 Shri Narandas and the defendant No.2 has also while receiving the notice put his signature having received notice by him on behalf of all the defendants and when that fact came to the knowledge of the appellant original defendant No.4, he has filed Application before the trial court as provided under Order 9 Rule 13 of the C.P.C. and the Application being M.C.A.No.32 of 2002 praying for stay of the execution proceedings is also pending. It is the submission of Mr. Trivedi that when the decree is passed by the learned trial Judge against all the defendants and when the appellant original defendant No.4 was not served as provided under the C.P.C., the decree under challenge is required to be set aside and prayed that the judgment and decree passed by the learned trial Judge against present appellant be set aside. Mr. Trivedi has also placed reliance upon the decision of the Apex Court in the matter of Sushil Kumar Sabharwal v. Gurpreet Singh reported in AIR 2002 SC 2370 and the observations made by the Apex court in paragraph 8, which we reproduce hereunder:-

> "8. We find several infirmities and lapses on the part of the process-server. Firstly, on the alleged refusal by the defendant either he did not affix a copy of the summons and the plaint on the wall of the shop or if he claims to have done so, then the endorsement made by him on the back of the summons does not support him, rather contradicts him. Secondly, the tendering of the summons, its refusal and affixation of the summons and copy of the plaint on the wall should have been witnessed by persons who identified the defendant and his shop and witnessed such procedure. The endorsement shows that there were no witnesses available on the spot. The correctness of such endorsement is difficult to believe even prima facie. The tenant runs a shoe shop in the suit premises. Apparently, the shop will be situated in a locality where there are other shops and houses. One can understand refusal by unwilling persons requested by the process-server to witness the proceedings and be a party to the procedure of the service of summons but to say that there were no witnesses

available on the spot is a statement which can be accepted only with a pinch of salt. Incidentally, we may state that though the date of appearance was 23rd February, 1993 the summons is said to have been tendered on 22nd February, 1993, i.e., just a day before the date of hearing."

2. Mr.Pandit, learned advocate, who appeared for the respondent plaintiff, has stated on perusing the record and proceedings that he has no defence and he conceded that the trial court has proceeded with the suit against all the defendants considering the fact that all the defendants are served and in fact summons issued by the trial court was not served to the present appellant defendant No.4 and as per order passed earlier below plaint on 15.12.90, the suit against defendants Nos.3 and 4 was proceeded ex parte. However, it is his submission that the execution proceedings is already initiated by the plaintiff bank and execution against rest of the defendants be permitted to proceed and to protect the interest of the plaintiff bank while setting aside the decree under challenge against only appellant original defendant No.4, the suit be ordered to be disposed of as expeditiously as possible only against present appellant.

3. Considering the submission made before us and as found from the record, the respondent - original plaintiff bank having its branch office at Porbandar, had instituted a suit in the court of the Civil Judge (SD), Porbandar against the present appellant and three others for recovery of the amount of Rs.1,10,829.85 Ps. with interest. The suit was presented on 30.9.89 and the learned trial Judge has issued summons on the defendants, which was made returnable on 18.11.89 as per order dated 30.9.89. As found, the summons, which was issued by the learned trial Judge, is at Exh.5 in the said Suit being Special Civil Suit No.56/89. The summons were issued on all the defendants including the present appellant Shri Amrutlal. All the defendants are residents of Porbandar and the appellant original defendant No.4 was one of the guarantors in respect of the loan taken by defendant No.1 from the plaintiff Bank. The summons and the Bailiff's report show that the summons issued against all the defendants were accepted by original defendant No.2 Shri Narandas on behalf of defendant No.1 as well as on behalf of rest of the defendants, namely, defendants Nos.3 and 4. The Bailiff's report also indicate that the summons issued was served and accepted by defendant No.2, who was present and who was the Proprietor of defendant No.1 Firm and he has accepted the summons on behalf of defendant

No.1 as well as defendants Nos.3 and 4 and the defendant No.2 Shri Narandas has singed the said summons acknowledging that the summons were received by him on behalf of all the defendants.

4. As found from the record, the learned trial Judge has on the basis of the pleadings framed issues for determination at Exh.21 on 12.10.93. As observed earlier the learned trial Judge has also in his judgment observed that though summons were issued and served on defendants Nos.3 and 4,they have not filed any written statement nor they have submitted any documentary evidence and they have not participated in the proceedings. On verification of the record it is found that Mr. Kotecha had filed Vakalatnama on behalf of defendant Nos.1 and 2 only and it is further found from the record that Shri Kotecha had during the proceedings before filing written statement filed purshish for adjournment and the learned trial Judge has granted request for adjournment for filing written statement. As observed earlier he filed written statement on behalf of the defendants Nos.1 and 2 and as found from the written statement the defendants had denied the case of the plaintiff for seeking money decree. However, alternatively the defendants had looking to the financial condition requested for granting instalment. The written statement Exh.20 is signed by defendant No.2 on behalf of himself as well as on behalf of defendant No.1.

5. The plaintiff has in support of its case produced documentary evidence in respect of the documents executed at the time of taking loan from the plaintiff bank, including the promissory note and these documents were signed by the parties. We are not observing on the merits of the case in view of the contentions raised by the appellant in this appeal. However, the learned trial Judge has accepted the case of the plaintiff and the suit filed by the plaintiff was decreed to the extent of Rs.1,10,829.85 Ps. and the decree was passed against all the defendants. While decreeing the suit, the trial court has awarded interest at the rate of 16.5% per annum.

6. The learned trial Judge has while considering the request for seeking instalment prayed by defendant Nos.1 and 2 while granting decree of Rs.1,10,829.85 Ps. with running interest at the rate of 16.5% per annum, granted instalment of Rs.15,000/-- per month commencing from 1.5.98 and if the defendants fail to pay any of the instalment continuously for 3 months, the plaintiff bank was entitled to recover the decretal amount at once.

Regarding cost, the learned trial Judge has ordered that defendant No.2 has to bear his own costs of the suit and also cost of the plaintiff.

7. As observed earlier, Mr. Pandit, learned advocate, had rightly conceded as found from the record that the trial court has proceeded against the defendants without examining the fact that whether all the defendants were duly served or not and as found from the record, the suit summons were received by Shri Narandas original defendant No.2 on behalf of himself as well as on behalf of defendants Nos.1, 3 and 4 and even the Bailiff's report also suggest the said fact. The learned trial Judge ought to have before proceeding with the suit examined the record as contemplated under the provisions of Order 3 Rule 2 as well as Order 5 Rule 11 of the C.P.C. and admittedly the decree was passed against all the defendants jointly. We may observe that the learned trial Judge has mechanically proceeded with the suit without verifying the record and even ignoring the provisions as contemplated under the C.P.C.

8. As observed earlier, though instalment of Rs.15,000/-- to be paid every month as per the decree in favour of the plaintiff, the defendants had failed to even deposit the instalment amount with the trial court. The suit was filed by the bank on 30.9.89 and as observed earlier, the trial court has decreed the suit on 31.3.98. As the defendants had failed to deposit the instalment amount, the plaintiff bank had filed execution application to execute the decree before the executing court on 8.8.2000 and the plaintiff bank had prayed for execution of the decree for recovery of the decretal amount including cost and interest amounting to Rs.3,48,844.60 Ps. and in the said proceedings even in Special Execution Application No.8 of 2000, the learned trial Judge has passed order of issuance of summons/notice, which was made returnable on 8.8.2000 and even again when the summons/notice was issued to the parties as per the Bailiff's report such summons/notice were effected only on defendant No.2 Shri Narandas on behalf of himself as well as on behalf of rest of the defendants. As found from the certified copy of the execution application with the report, it shows that the Bailiff has submitted report before the trial court on 10.1.2001 indicating that notice is duly served to defendants Nos.1 to 4, received by defendant No.2. In all the matters when the matter is before the court and the court passes any order of issuance of summons/notice in favour of the parties, the service is always to be effected through Bailiff. Here in the present case, the

Bailiff has also not properly served the notices to the parties. Bailiff is also required to be more vigilant while serving the court summons/notice to the parties. Bailiff has in term served the notice only to defendant No.2 and defendant No.2 had accepted the said summons/notice on behalf of himself as well as on behalf of rest of the defendants and report to that effect was also submitted by Bailiff before the trial court. The trial court is also equally required to look into the papers and to examine report submitted by bailiff in respect of the service of the notice/summons. While perusing the record, the report submitted by the bailiff clearly indicate that he had not affected service of notice/summons to all the parties and equally when such report is made, the learned trial Judge has not looked into the said report and proceeded further with the suit and the decree is passed.

9. While deciding this Appeal, we have not examined the documents produced by the plaintiff in respect of the claim of the plaintiff bank against defendants and while deciding this Appeal, as observed earlier, we have focused only on one contention raised by Mr.Trivedi in respect of non service of the summons/notice to the appellants defendant No.4 and accordingly this court is inclined to allow this Appeal of the appellant only on this count that the summons/notice issued by the learned trial Judge against the present appellant was not properly served and the appellant is entitled for prayer for setting aside such decree. We are also conscious that the Bank has also filed execution proceedings to execute the decree. Other defendants have not challenged the said decree and accordingly while allowing this Appeal and while setting aside the decree under challenge, we may observe that decree under challenge is set aside only against the present appellant i.e. original defendant No.4. Accordingly judgment and decree passed by the trial court dated 31.3.98 in Special Civil Suit No.56/89 is set aside qua appellant original defendant No.4. However, in the circumstances of the case, there will be no order as to costs. As the judgment and decree is set aside only against appellant original defendant No.4, we direct the trial court to take all steps as provided under law and liberty is granted in favour of the respondent plaintiff bank to take all steps to prove the case in respect of the suit claim against appellant original defendant No.4. The Office is directed to send back record and proceedings forthwith. In view of the fact that the appellant original defendant No.4 has challenged the judgment and decree on the above ground, the appellant original

defendant No.4 is directed to file written statement as expeditiously as possible and the trial court shall proceed with the said suit only against appellant original defendant No.4 as expeditiously as possible and decide the same in accordance with law.

10. In view of the order passed in the main Appeal, the Civil Application No.6387 of 2002 for stay does not survive and the same stands disposed of accordingly.

(D.K.Trivedi,J)

(K.M.Mehta,J)

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